

The Pledge of Allegiance: Patriotic Duty or Unconstitutional Establishment of Religion?

The Ninth Circuit's recent ruling that struck down *The Pledge of Allegiance* for violating the First Amendment's prohibition of governmental establishment of religion (*Newdow v. U.S. Congress*, 2002a, 2003) (*Newdow I, II*) has generated a firestorm of controversy. In the face of widespread criticism, the Ninth Circuit stayed *Newdow II* as the school board in California announced its intention to appeal to the Supreme Court (Hudson, 2003; Walsh, 2003).

Newdow II stands in direct opposition to a 1992 case from Illinois (*Sherman v. Community Consolidated School*

District 21 of Wheeling Township), wherein the Seventh Circuit affirmed that school officials could lead the pledge, including the words "under God," as long as children were free not to participate. Such a split between federal appellate courts typically results in the Supreme Court's agreeing to hear an appeal to settle the state of the law.

History of the Pledge of Allegiance

Absent the words "under God," *The Pledge of Allegiance* was written in 1892 by Francis Bellamy, a Baptist minister and chair of a committee of the National Education



By Charles J. Russo, J.D., Ed.D.

Association dealing with state superintendents (Adams, 2002). On September 8, 1892, about a month after the pledge first appeared in *The Youth's Companion*, a popular magazine for children, millions of public school students recited it for the first time in celebration of the 400th anniversary of Columbus' discovery of America (Wagenseil, 2002).

The earliest sign of support for the pledge occurred in 1898, when the New York Legislature passed the first statute requiring students to recite the pledge. In 1919, Washington state enacted the first law directing teachers, under the risk of dismissal, to lead weekly flag exercises (Concannon, 1989). By 1940, at least 18 states had enacted laws calling for the pledge, salutes to the flag, or both (Concannon, 1989).

In the 1950s, a campaign by the Knights of Columbus, a Roman Catholic fraternal and charitable organization, and other religious groups (Dolan, 2002; Wagenseil, 2002), prompted President Eisenhower to sign into law an amendment to the pledge that added the words "under God" (*Pledge of Allegiance to the Flag*, 2003). In an attempt to avoid litigation, congressional sponsors of the act disclaimed any religious purpose, distinguishing between "religion as an institution and a belief in the sovereignty of God" (H.R. Rep., 1954, p. 3).

More recently, following *Newdow I*, the Senate and House of Representatives adopted a resolution reaffirming the reference to "one Nation under God in the Pledge of Allegiance" ("Act to Reaffirm the Reference," 2002). As with the 1954 change, Congress acknowledged the importance that Americans, as a religious people, place in a belief in God. To the extent that litigation over statutes and policies requiring students to recite the amended pledge—typically accompanied by ceremonies saluting the flag—has had mixed results, the situation is far from clear.

Supreme Court Cases

Religious opposition to *The Pledge of Allegiance* and flag salute appeared as early as 1918 (Concannon, 1989). Yet, the first reported case involving the pledge, *Nicholls v. Mayor of Lynn*, was not until 1937, when the Supreme Judicial Court of Massachusetts rejected a challenge to the pledge filed by Jehovah's Witnesses based on the First Amendment. The court held that as a valid legislative enactment that did not establish a penalty for a disobedient student, the state had the right "to inculcate patriotism and to instill a recognition of the blessings conferred by orderly government . . ." (p. 579). In addition, the court observed that the pledge did not restrain anyone from worshipping God within the meaning of the First Amendment.

Over the following 3 years, the U.S. Supreme Court refused to hear four cases that questioned the constitutionality of the pledge or the flag salute, all because they lacked a substantial federal question. In *Leoles v. Landers* (1937), the Supreme Court dismissed an appeal from Georgia, where a state court affirmed that school officials acted lawfully

in expelling students who refused to salute the flag incident to their duty to instruct children in the study of and devotion to American institutions and ideals.

A year later, in *Hering v. State Board of Education* (1938), the Supreme Court dismissed an appeal from New Jersey, where a state court affirmed that students could be required to recite the pledge because it was just that: a pledge, not an oath.

In *Johnson v. Town of Deerfield* (1939), the Court summarily affirmed an order of the federal trial court in Massachusetts that refused to enjoin a statute requiring students to recite the pledge, maintaining that attendance in public schools is subject to reasonable state regulations. On the same day, in *Gabrielli v. Knickerbocker* (1939), the Supreme Court dismissed an appeal from California that upheld the actions of school officials who expelled a student who refused to recite the pledge and salute the flag. The Court found that a local board had the power to impose a reasonable regulation designed to promote the efficiency of its schools as they educate children in good citizenship, patriotism, and loyalty to state and nation.

In *Minersville School District v. Gobitis* (1940), the Court finally accepted on the merits a case challenging the constitutionality of requiring students to salute the flag. The Court rejected the claim of Jehovah's Witnesses from Pennsylvania who argued that requiring their children to salute the flag while in school was equivalent to forcing them to worship an image that violated their right to freedom of religion. The Court reasoned that the students were not free to excuse themselves from participating in the pledge because it was a rational way for the state to teach patriotism in schools.

Faced with significant criticism of *Gobitis*, the Court revisited the issue when Jehovah's Witnesses and others challenged the constitutionality of a revised state board of education regulation under which refusal to participate in saluting the flag could have been treated as an act of insubordination leading to expulsion from school. As in *Gobitis*, the Jehovah's Witnesses argued that the salute violated their rights to religious freedom.

In *West Virginia State Board of Education v. Barnette* (1943), the Court was torn by the conflict between state authority and individual rights and took the unusual step of explicitly reversing *Gobitis*. Ruling in favor of the children who challenged their being compelled to salute the flag, the Court was convinced that public school officials exceeded constitutional limitations on governmental power by invading their sphere of intellect and spirit protected by the First Amendment. The Court concluded that, "To believe that patriotism will not flourish if patriotic ceremonies are voluntary and spontaneous instead of a compulsory routine is to make an unflattering estimate of the appeal of our institutions to free minds" (p. 641). Although not explicitly referring to it, the Court was undoubtedly influenced by the fact that, as World War II raged on, American and other forces were fighting to ensure freedom for peo-

ples throughout the world. Interestingly, although religion admittedly played a part in both cases that reached the Supreme Court, in neither instance had the words “under God” been added to the pledge.

Lower Court Cases

The pledge was not litigated again until almost a quarter of a century after *Barnette*. In *Holden v. Board of Education, Elizabeth* (1966), the New Jersey Supreme Court considered whether Black Muslim children who refused to recite the pledge could be excluded from public school based on their claim that to do so would violate their religious beliefs. The facts revealed that the students stood respectfully at attention and were not disruptive while their classmates participated in the pledge. Although the students claimed that their beliefs were motivated as much by politics as by religion, school officials rejected their allegation of “conscientious scruples” because the two were intertwined with their racial motives. Although not resolving whether the students’ refusal to salute the flag was religious or political, the court ordered the students’ reinstatement.

In a dispute from Florida (*Banks v. Board of Public Instruction of Dade County*, 1970, 1971), the then Fifth Circuit (now the Eleventh) struck down requirements that would have directed students who objected to saluting the flag to stand while their classmates did so. Maryland’s high court did the same in *State v. Lundquist* (1971). In neither case had officials offered students the option of leaving their classrooms. However, even when students had the choice of leaving the room or standing silently during the pledge, the Second Circuit determined that school officials in New York could not discipline a student who objected by remaining quietly seated (*Goetz v. Ansell*, 1973). The court decided that forcing a student to stand was no more acceptable than having him or her leave the room while the pledge was recited, since that might reasonably be viewed as punishment for not participating.

The first of three cases directly involving a teacher was *Russo v. Central School District No. 1* (1972, 1973), wherein a teacher in New York refused to recite the pledge as a matter of conscience. The Second Circuit opined that the teacher, who stood silently without interfering in any way while her students recited the pledge, could not be required to join in the ceremony. The Supreme Court refused to hear an appeal.

Five years later, the Supreme Judicial Court of Massachusetts handed down a nonbinding advisory opinion, rendered in the absence of a live controversy, when the governor asked its members how they would have ruled if litigation arose over a bill dealing with the pledge. In *Opinion of the Justices* (1977), the court posited that a bill designed to have public school teachers begin the first class of each day by leading students in a group recitation of the pledge would violate the First Amendment. The court declared the proposed law unacceptable because it feared that an element



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of compulsion was present, even though the proposed mandate did not impose criminal penalties against noncomplying teachers.

In the only other case involving the merits of a claim by a teacher, *Palmer v. Board of Education* (1979, 1980), the Seventh Circuit reached the opposite conclusion. The court affirmed that despite her claim that doing so conflicted with her religious beliefs, a public school teacher in Illinois was not free to disregard the prescribed curriculum with regard to patriotic matters. The court upheld the school board’s dismissing the teacher because she refused to participate in the pledge, sing patriotic songs, and celebrate certain national holidays. Once again, the Supreme Court refused to hear an appeal.

Returning to cases that focus primarily on students, the Seventh Circuit affirmed that school officials in Illinois could lead the pledge, including the words “under God,” as long as children were free not to participate. In *Sherman v. Community Consolidated School District 21 of Wheeling Township* (1992, 1993), the court rejected a father’s claim that the pledge violated his son’s First Amendment right to freedom of religion. The court noted that the use of the phrase “under God” in the context of the secular vow of allegiance was a “patriotic or ceremonial” expression rather than one of religious belief. The Supreme Court refused to hear an appeal.

The most recent controversy involving the pledge arose in California, where a self-professed atheist, noncustodial father challenged a board policy requiring teachers to begin each school day by having students recite the pledge. Although the father conceded that his daughter was not required to join her classmates, he claimed that she was injured by being “compelled to ‘watch and listen as her state-employed teacher in her state-run school [led] her classmates in a ritual proclaiming that there is God’” (*Newdow II*, 2003, p. * 14). Interestingly, the mother of the 8-year-old reported that neither she nor her daughter was troubled by the requirement (“Out From Under God,” 2002).

In an unpublished opinion, a federal trial court accepted the recommendation of a magistrate judge that the pledge was constitutional and so dismissed the challenge. On further review in *Newdow I* (2002a), the Ninth Circuit, which has jurisdiction over Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon, and Washington, vacated the federal trial court’s dismissal of the case by a 2–1 vote and struck down the 1954 statute that added the words “under God” to the pledge and the board policy authorizing its daily recitation. Rejecting congressional disclaimers of a religious purpose in revising the pledge, the court believed that both the statute and policy violated the establishment clause insofar as teachers had to begin each school day by having students recite the words “under God.” In the face of significant criticism, the court stayed its judgment a day later (*Newdow I*, 2002a).

After initially refusing to reconsider its opinion and rejecting motions that Congress (*Newdow I*, 2002b, 2002c) and the child’s mother (*Newdow I*, 2002c) be permitted to intervene in the litigation, the Ninth Circuit refused by a 15–9 vote to conduct an en banc hearing to re-examine *Newdow I* (*Newdow II*, 2003). Instead, the same initial panel of judges struck down the pledge—again, by a 2–1 margin—this time focusing on the narrower ground that “the school district policy impermissibly coerces a religious act” (*Newdow II*, p. * 18). In what may appear to be a technical point, the Ninth Circuit virtually glossed over the issue of standing—whether the noncustodial father could file suit challenging the pledge. The court almost summarily asserted that the noncustodial father had standing even though, as noted, the child’s mother, whom it inexplicably refused to permit to intervene, claimed that her daughter did not suffer any harm (“Out From Under God,” 2002). Although *Newdow II* applies only to schools, it has generated no less controversy than *Newdow I*.

Discussion

In light of the split between the circuits following *Sherman* and *Newdow II*, there is a reasonably good chance that the Supreme Court will agree to resolve the difference in judicial opinions over the constitutionality of including the words “under God” in the pledge. Yet, even as the school board promised to appeal *Newdow II* (Hudson, 2003; Walsh, 2003), legislators are proposing other ways of blunt-

ing the Ninth Circuit’s action in *Newdow II*. House Majority Leader Tom DeLay of Texas suggested that, relying on its authority under Article III, Section 2, of the Constitution, Congress could remove matters relating to *The Pledge of Allegiance* from the jurisdiction of the federal judiciary if the Supreme Court refused to overturn *Newdow II* (Dinan, 2003). This same news story reported that 2 days earlier, the Senate voted 94–0 to support the current wording of the pledge, just as the House adopted a similar resolution during the summer of 2002 by a vote of 416–3, with 11 members voting “present.”

Justices O’Connor and Kennedy typically have the greatest impact on the Court’s actions in cases involving religion in the marketplace of ideas, including public schools.

Consistent with most educational disputes that have reached it, the Supreme Court is clearly divided into three distinct camps. At one end are the accommodationists, Chief Justice Rehnquist and Justices Scalia and Thomas. These members of the Court do not believe in an absolute separation of Church and State (language that does not appear in the text of the Constitution) and consistently vote in favor of permitting religious activity in public school.

At the other end of the bench are the separationists, Justices Stevens, Ginsberg, Souter, and Breyer, who vote to exclude religious activities in public schools. Given their individual and bloc votes, it is safe to say that the accommodationists likely will uphold the pledge, whereas the separationists probably will vote to affirm the Ninth Circuit’s decision in *Newdow II*.

In the middle of the Court are the two moderate, or swing, votes: Justices O’Connor and Kennedy. These two justices typically have the greatest impact on the Court’s actions in cases involving religion in the marketplace of ideas, including public schools.

Perhaps the best example of O’Connor’s influence in the important arena of religion is a far-reaching nonschool case, *Lynch v. Donnelly* (1984). In *Lynch*, wherein the Court permitted a Christmas display that included Santa’s house, a Christmas tree, and a Nativity scene on public property, she used her concurring opinion to enunciate her “endorsement test.” Under this test, O’Connor wrote that

endorsement sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community. Disapproval sends the opposite message. (pp. 687–688)

She added that “irrespective of government’s actual purpose, [if] the practice under review in fact conveys a message of endorsement or disapproval . . . [a] court should render the challenged practice invalid” (p. 690). Under

this test, O'Connor and, on occasion, other members of the Court and lower federal judiciary have been reluctant to permit religious activities in schools when public school officials appear to endorse religion or particular religious activity.

Since O'Connor and Kennedy have reached mixed results with regard to religious activity in public school settings, there is an initial cause to believe that they might uphold the pledge. For example, in *Lee v. Weisman* (1992), Kennedy authored the majority opinion, joined by O'Connor, in striking down school-sponsored graduation prayer on the ground that students were coerced to participate in such ceremonies. Further, both justices joined the Court's majority in *Santa Fe Independent School District v. Doe* (2000), wherein the Court, relying in part on O'Connor's endorsement test, struck down ostensibly student-led prayer before a high school football game. On the other hand, both justices joined the majority in *Good News Club v. Milford Central School* (2001), wherein the Court upheld the right of a Christian club to meet in public school facilities after hours, since secular groups had access to do the same.

In *Newdow*, the Ninth Circuit discussed the wild card issue of whether the Court was willing to treat the words "under God" in the pledge as what was euphemistically described as "civic deism," "wherein references to God [such as] contained in the *Pledge of Allegiance* . . . [are] protected from Establishment Clause scrutiny chiefly because they have lost through rote repetition any significant religious content" (*Lynch*, 1984, p. 716). Put another way, it remains to be seen whether the Court is willing to acknowledge that, although the pledge contains the words "under God," it neither has had, nor apparently has, a tendency to establish a state religion or suppress the beliefs of minority groups because religious freedom is so deeply imbedded in the American consciousness. As such, the key question for O'Connor and Kennedy, in particular, is whether the words "under God" in the pledge should be treated differently from other forms of religious expression, such as prayer.

The initial optimism that O'Connor and Kennedy might uphold the pledge must be tempered by the reality that, based on their opinions in *County of Allegheny v. American Civil Liberties Union Greater Pittsburgh Chapter* (1989), their attitudes about "civic deism" appear to be in concert. However, unlike the mixed positions they have adopted on other aspects of religion in public schools, their positions in *Allegheny* do not appear to bode well for the pledge. In *Allegheny*, another nonschool case, the Court struck down the display of a crèche on public property as violating the Establishment Clause. At the same time, the Court permitted a display consisting of a menorah, Christmas tree, and sign about religious freedom to remain on public property, concluding that the display did not have the unconstitutional effect of advancing religion. In her concurring opinion, O'Connor applied the endorsement test in discussing ceremonial deism in the form of legislative prayers

or statements at the opening of judicial sessions that mention God. She commented that, "Examples of ceremonial deism do not survive Establishment Clause scrutiny simply by virtue of their historical longevity alone" (p. 630). Rather, insofar as she declared that ceremonial deism would still have to pass muster under her endorsement test, it is doubtful whether the pledge would survive O'Connor's scrutiny.

Apart from Representative DeLay's remarks about introducing legislation designed to limit the Court's jurisdiction in such matters, Congress has clearly and unequivocally gone on record over the past year in support of the current wording of the pledge.

Kennedy's dissent in *Allegheny* echoed Justice O'Connor's sentiment. In discussing the pledge's use of the words "under God," he stated that although "no one is obligated to recite the phrase . . . it borders on sophistry to suggest that the 'reasonable' atheist would not feel less than a 'full member of the political community' every time his fellow Americans recited, as part of their expression of patriotism and love for country, a phrase he believed to be false" (p. 673).

At this point, should the Supreme Court agree to review *Newdow II*, the results may be too close to call. If the Court accepts *Newdow II* for review, it needs to be mindful of three important matters. First, the justices must consider whether the pledge is, in fact, an unconstitutional establishment (or endorsement) of religion or, regardless of its being treated as ceremonial deism, whether it is an expression of America's deeply, long-held belief in God. Second, the justices must examine the impact of striking down the pledge on American public schools and society as a whole. Put another way, one can wonder whether the public would lose respect for the Court if it were to vitiate the pledge. Third, the Court must ask itself whether it is willing to set up a showdown with Congress. Apart from Representative DeLay's remarks about introducing legislation designed to limit the Court's jurisdiction in such matters, Congress has clearly and unequivocally gone on record over the past year in support of the current wording of the pledge. Of course, the Court could avoid the constitutional merits of the claim in *Newdow II* should it find that the noncustodial father had no standing to sue, especially since the mother was not troubled by her child's joining in the pledge.

Turning to the merits on any decision the Court might render, should O'Connor strictly apply her endorsement test, she may well tip the scales in favor of the separationists, regardless of how Kennedy rules. And, apart from what

O'Connor decides, Kennedy's dissent in *Allegheny* suggests that he, too, will likely side with the separationists.

The key question will be whether O'Connor and Kennedy can be swayed by Judge Fernandez's dissent in *Newdow I* and stop short of striking down the pledge. Even in clearly recognizing that constitutional rights are not subject to a majority vote, and that minority rights must be protected, it is well worth noting that in *Newdow I*, Fernandez presciently questioned whether the two-judge majority sought to "cool the febrile nerves of a few [opponents of the pledge] at the cost of removing the healthy glow conferred upon the many citizens when the forbidden verses, or phrases, are uttered, read, or seen" (p. 615). Indeed! ■

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Charles J. Russo, J.D., Ed.D., Joseph Panzer Chair of Education in the School of Education and Allied Professions and adjunct professor in the School of Law at the University of Dayton in Dayton, Ohio, is also vice-chair of ASBO's Legal Affairs Committee.



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